DANAHARTA URUS SDN BHD

v.

KEKATONG SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
JAMES FOONG J
[ORIGINATING SUMMONS NO: S1-24-2801-2002]
27 JULY 2004

LAND LAW: *Caveat - Removal, application for - Application by applicant/ Danaharta Urus Sdn Bhd to remove caveats on charged lands - Whether application by way of originating summons proper - Whether applicant estopped from raising factor on no serious question to be tried - Whether applicant an aggrieved party - Whether registered owner could not enter caveats on own land - Whether limitation applicable - Whether vesting certificate null and void - Whether balance of convenience in favour of applicant*

This was an application by the plaintiff Danaharta Urus Sdn Bhd for the removal of caveats placed on four pieces of land ('the said lands') entered by the defendant/registered owner of the said lands. The plaintiff acquired the said lands from Bumiputra Commerce Bank Bhd ('BBMB') *via* a vesting certificate under the Pengurusan Danaharta Nasional Berhad Act 1998 ('the Danaharta Act'). Before that the facts showed that BBMB held the said lands by way of a third party charge for loan facilities that were granted to a company and had in fact obtained an order for sale on the said lands upon default of the loan. However, the defendant managed to successfully set the order aside on the ground that Form 16D of the National Land Code ('NLC') was not served on the defendant's registered address. BBMB then issued and served a fresh Form 16D on the defendant after which the plaintiff took over. There was a pending suit by the defendant ('85 suit') against both the plaintiff and BBMB primarily to nullify their rights over the said lands by reasons of limitation and invalidity of the vesting certificate. As an interim measure the plaintiff applied for an interim injunction to restrain the plaintiff and BBMB from dealing with the said lands until the disposal of the 85 suit. The High Court dismissed the application. This was reversed on appeal wherein the Court of Appeal granted the interim injunction at the same time declaring s. 72 of the Danaharta Act unconstitutional. When the matter proceeded to the Federal

Court, the Federal Court set the injunction order aside and declared s. 72 constitutional (see [2004] 1 CLJ 701). Though without the injunction, the plaintiff still faced the caveats placed on the said lands and that led to the present application.

Held (allowing the plaintiff's application with costs):

[1] Though the 85 suit concerned the said lands, these caveats were never an issue raised therein. It was only when these caveats were specifically raised or made an issue, either in the form of a claim or counterclaim would it be more appropriate to proceed by way of summons-in-chambers under O. 32 r. 1 RHC. (pp 358 h & 359 a)

[2] The very fact that the Federal Court discharged the injunction granted by the Court of Appeal and reiterated that "clearly sales of these properties would be substantially delayed if injunctive relief was available" must be viewed as having accepted a ruling of there being no serious question to be tried. Also, that the Court of Appeal's ruling of there being one was erroneous. Further, there were other factors not considered by the Court of Appeal that now appeared in the instant case in deciding whether there was a serious question to be tried. (p 359 e-g)

[3] Though the Danaharta Act allowed the plaintiff to sell the said lands to a purchaser despite the existence of the caveats, these caveats would continue to remain on the document of title after the transfer to the purchaser. Therefore, the plaintiff fell within the category of an aggrieved person under s. 327 NLC. (p 360 e-f)

[4] There was no serious question to be tried. This is based on the legal proposition that a registered owner of a piece of land cannot enter a caveat on its own land. Section 323(1)(a) NLC clearly and unambiguously states that only a person or body claiming title or interest in any alienated land or any right to any such title or interest may caveat the land. A person who files a suit concerning his land could not logically claim that he was in the position of one claiming title or any registrable interest in such land. He was already the legal owner of the title and as such legal owner the question of any right to any such title or interest could not possibly arise. (pp 361 c, h & 362 a)

[5] Limitation is merely a defence to an action and cannot be a cause of action. In the 85 suit, the plaintiff was not the person who initiated the action to enable the defendant to rely on such defence of limitation. It was the other way round. Therefore, the defendant's claim could not succeed. (pp 362 f-g & 363 a)

[6] Under s. 14(7) of the Danaharta Act, a vesting certificate executed under the seal of the plaintiff stating that an asset has been vested in the plaintiff is "conclusive evidence of such vesting as of the date of such vesting. The vesting certificate tendered to this court was sealed on 31 July 1999. The defendant's contention that limitation had set in before the purported vesting must fail as the alleged limitation under the Limitation Act could not act as a sword but only a shield to defend an action. Also, the defendant's contention that there were different vesting dates was irrelevant as the effective date of the vesting was on 31 July 1999 and it was this date the plaintiff relied on to make this application. (pp 365 b, e-h & 366 a-c)

[7] The first statutory notice dated 24 December 1985 was declared ineffective by the Court of Appeal because it was not served at the correct address. This caused BBMB to issue a fresh Form 16D NLC notice on 13 October 1998. The date of the second statutory notice should be the date of accrual for the purpose of the Limitation Act since the first statutory notice was declared ineffective. Therefore calculated from 13 October 1998, the 12-year period imposed by the Limitation Act did not lapse. (p 366 d-e)

[8] The said lands were within the golden triangle area of Kuala Lumpur. Though there was a house thereon, it was of no heritage or sentimental value. The real worth of the said lands was at its commercial value with nothing thereon so that it could be developed. Therefore, any damages resulting from the disposal of the said lands to a third party, if the caveats were lifted could be quantified. (p 366 f)

[9] The plaintiff, with the backing of the Malaysian government had far greater financial ability than the defendant. The defendant was relatively poor with no business activity and had not filed its financial returns for the past 20 years. On this factor, the balance of convenience was in favour of the plaintiff who could afford to pay any amount of damages assessed by the court for the loss of the said lands in the event the ruling of the 85 suit was in favour of the

defendant. If it were the other way around, there was very little likelihood that the defendant could satisfy the plaintiff monetarily for damages it suffered as a result of the remaining caveats. In any event the main element involved in this case was the fiscal aspect. (pp 366 g-h & 367 a)

[10] The amount due and owing by the defendant to the plaintiff as the result of the unpaid loan was substantial. With interest thereon running by the day, any delay in the disposal of the said lands would cause greater hardship to the defendant. Further, the sale of the said lands was delayed on previous occasions. Such delay should not be occasioned once again by these caveats. (p 367 b-c)

Case(s) referred to:

Affin Bank Bhd v. Dato' Mohamed Embong [2002] 1 CLJ 202 HC ***(foll)***

Asia Commercial Finance (M) Bhd & Anor v. Development & Realtor Sdn Bhd [1992] 2 CLJ 1175; [1992] 2 CLJ (Rep) 109 HC ***(foll)***

Cotterell v. Price & Ors [1960] 3 All ER 315 ***(refd)***

Eng Mee Yong & Ors v. V Letchumanan [1979] 2 MLJ 212 ***(refd)***

Ideal City Development Sdn Bhd v. Dynamic Mould Sdn Bhd [2003] 3 CLJ 201 CA ***(refd)***

J Raju v. Kwong Yik Bank Bhd & Anor [1994] 2 MLJ 417 ***(refd)***

Kumpulan Sua Betong Sdn Bhd v. Dataran Segar Sdn Bhd [1992] 1 CLJ 20; [1992] 1 CLJ (Rep) 150 SC ***(refd)***

Lewis v. Plunket [1937] 1 All ER 530 ***(not foll)***

Punca Klasik Sdn Bhd v. Abdul Aziz Abdul Hamid & Ors [1994] 1 CLJ 403 HC ***(refd)***

Re An Application by Haupiri Courts Limited (No 2) [1969] NZLR 353 ***(foll)***

Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham [1998] 4 CLJ 812 CA ***(refd)***

Saw Cheng Boon v. Mohd Farook Shaik Mohaidin [1995] 3 CLJ 759 HC ***(refd)***

Sharifah Mastura Tuanku Ibrahim v. Wan Aziz Ibrahim [1993] 1 CLJ 298 HC ***(foll)***

Tan Su Sing v. Haluan Kreatif Sdn Bhd [1998] 1 CLJ Supp 407 HC ***(refd)***

United Malayan Banking Corporation Bhd v. Development & Commercial Bank (Ltd) Bhd [1983] 1 MLJ 165 ***(refd)***

Legislation referred to:

Limitation Act, s. 21(1), (2), (5)

National Land Code, s. 327, Form 16D

Pengurusan Danaharta National Berhad Act, ss. 14(7), 16(1), 19(2), (3), 72

Rules of the High Court 1980, O. 5 r. 3, O. 32 r. 1

Limitation Act [UK], s. 23(a)

Real Property Limitation Act 1833, s. 34

Real Property Limitation Act 1874, s. 1

For the plaintiff - SM Yoong (TC Lim); M/s Shook Lin & Bok
For the defendant - Bastian Pius Vendargon; M/s Jayraman, Ong & Co

Reported by Usha Thiagarajah

JUDGMENT

James Foong J:

Introduction

Enclosure 1 is an application of the plaintiff, by way of originating summons, to remove caveats placed on 4 pieces of land held under Grant 31902, 31903, 31904, 31905 for Lots 267, 268, 269 and 271 respectively, all in section 0063, Bandar of Kuala Lumpur (the said lands) by the defendant.

Background

The background of this case is as follows:

The defendant is the registered owner of the said lands. These lands were charged to Bank Bumiputra Malaysia Berhad (BBMB), by way of a third party charge, for loan facilities granted to a company known as Kredin Sdn Bhd (Kredin). Kredin failed to repay the loan to BBMB. This resulted in BBMB foreclosing on the said lands after initially issuing to the defendant the statutory notice of demand which was not satisfied.

An Order for Sale was obtained by BBMB on the said lands. Before any success could be achieved at the public auction, the defendant filed a motion to set aside the Order for Sale on the ground that Form 16D of the NLC was not served on the defendant's registered address. This motion was dismissed by the judge of first instance but on appeal, the Court of Appeal allowed the appeal.

Subsequent to the decision of the Court of Appeal, BBMB on 13 October 1998 issued and served a fresh Form 16D NLC on the defendant.

On 7 May 1999, the plaintiff acquired the loan granted to Kredin and the security over the said lands from BBMB under a vesting certificate permitted under the Pengurusan Danaharta National Berhad Act (Danaharta Act).

This was soon met by a suit from the defendant filed on 23 January 2002 in the High Court at Kuala Lumpur bearing number S5-22-85-2002 (85 Suit) where the defendant named Bumiputra-Commerce Bank Bhd (the successor of BBMB) as the 1st defendant and the plaintiff as the 2nd defendant. Basically this action sorts to nullify the rights of these two parties over the said lands for reason that their rights are statute barred and that the vesting certificate is null, void, and of no effect.

As an interim measure, the defendant applied in the 85 Suit for an interlocutory injunction to restrain the plaintiff and Bumiputra-Commerce Bank Bhd from dealing with the said lands until disposal of the 85 Suit. Justice Azmel disallowed this after hearing the application *inter parte*. An appeal was lodged with the Court of Appeal over this decision. The Court of Appeal allowed the appeal. This matter then proceeded to the Federal Court where the question referred to concerns: whether s. 72 of the Danaharta Act is unconstitutional and therefore void.

The Federal Court on 16 January 2004 answered the said question in the negative and the interim injunction granted by the Court of Appeal was set aside.

Though without the injunction, the plaintiff still faces the caveats placed by the defendant on the said lands. The plaintiff now desires to have them removed.

Preliminary Objections

During the hearing of encl. 1 the defendant raised 3 preliminary objections which I shall deal with in turn.

1. This Application By Way Of Originating Summons Is Wrong In Procedure

The first preliminary objection is that plaintiff has adopted a wrong procedure in making this application; it should be by way of summons-in-chambers under the 85 Suit since O. 5 r. 3 of the Rules of the High Court (RHC) expressly states that such procedure does not apply in a pending proceeding, and 85 Suit is a pending proceeding relating to the said lands.

I disagree with this argument. Though the 85 Suit concerns the said lands these caveats are never an issue raised therein. It is only when these caveats are specifically raised or made an issue, either in the form of a claim or counterclaim, then under O. 32 r. 1 of the RHC it would be more appropriate "to rely upon as was suggested in the case of *Tan Su Sing v. Haluan Kreatif Sdn Bhd* 8 Mallal's Digest (4th edn, 2000 Reissue) para

2796, [1998] 1 CLJ Supp 407 ... to proceed by way of summons-in-chamber" – *Ideal City Development Sdn Bhd v. Dynamic Mould Sdn Bhd* [2003] 3 CLJ 201.

2. The Plaintiff Is Estopped From Raising The Factor Concerning A Serious Question To Be Tried Since It Has Already Been Determined By The Court Of Appeal In The 85 Suit When Granting The Interim Injunction; And As Such Res Judicata Also Applies

The second preliminary objection of the defendant is that the Court of Appeal has found a serious question to be tried when allowing an interim injunction in favour of the defendant in the 85 Suit. This finding, as claimed by the defendant, was never overruled by the Federal Court which concentrated only on whether s. 72 of the Danaharta Act is unconstitutional. Since the principles in determining removal of caveat is similar to that of granting or a refusal of an interim injunction the said ruling by the Court of Appeal (of there being a serious question to be tried) would estop the plaintiff from denying this fact here; *res judicata* should similarly apply under these circumstances.

I am afraid that the defendant has a wrong perception of the Federal Court's ruling *vis a vis* that the apex court did not disturb the finding of the Court of Appeal on the issue of there being no serious question to be tried. The very fact that the Federal Court discharges the injunction granted by the Court of Appeal and reiterated that "clearly sales of these properties would be substantially delayed if injunctive relief was available" must be viewed as having accepted a ruling of there being no serious question to be tried and that the Court of Appeal's ruling of there being one was erroneous.

Further, there are other factors not considered by the Court of Appeal which now appear in this instant case in deciding whether there is a serious question to be tried. These are: (a) the inability of the defendant in mounting a cause of action based on limitation; (b) limitation in the circumstances of this case does not run based on the facts as disclosed and; (c) even if it does, it has no effect on the rights of the plaintiff under the Danaharta Act.

For these reasons I find no merits in this second preliminary objection of the defendant.

3. Plaintiff Is Not An Aggrieved Party

According to the defendant, since s. 16(1) and 19(2) & (3) of the Danaharta Act permit the plaintiff to deal with and transfer the said lands irrespective of the presence of the caveats, the plaintiff cannot be considered as "an aggrieved party" under s. 327 NLC.

The test to determine whether a party is an "aggrieved party" under s. 327 NLC has been pronounced in a number of authorities. In *Punca Klasik Sdn Bhd v. Abdul Aziz bin Abdul Hamid & Ors* [1994] 1 CLJ 403 it is "a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something". And in the Federal Court in *United Malayan Banking Corporation Bhd v. Development And Commercial Bank (Ltd) Bhd* [1983] 1 MLJ 165 at p. 167 it seems to be whether a person "would suffer loss if the caveat was not removed".

The plaintiff though accepting that it has powers to deal with and to transfer the said lands to a third party despite the presence of the caveats, the said lands are less attractive in the property market since a purchaser would still encounter these caveats if they are not removed. In short, the plaintiff is of the view that though Danaharta Act allows the plaintiff to sell the said lands to a purchaser despite the existence of these caveats, these caveats would continue to remain on the document of title after the transfer to the purchaser.

Applying the test to determine whether a person is an aggrieved party to the circumstances of this case, I find that the plaintiff falls within this category of an aggrieved person under s. 327 NLC. I hold the view that the presence of these caveats has wrongfully affected the plaintiff's title on the said lands and the plaintiff would suffer loss if they are not removed in the sense as described and explained by the plaintiff above. With these, I reject this third preliminary objection of the defendant.

Substantive Arguments

Principles To Be Applied

In the locus classicus case of *Eng Mee Yong & Ors. v. V Letchumanan* [1979] 2 MLJ 212 it is declared that to consider an application of this nature the test is first: the caveator must satisfy the court that his claim to an interest in the land does raise a serious question to be tried, and second: that on the balance of convenience whether it favours the caveat to remain.

When I inquired into degree and depth of indulgence in examining the circumstances of the case for application, I was directed to a passage of the Supreme Court in *Kumpulan Sua Betong Sdn Bhd v. Dataran Segar Sdn Bhd* [1992] 1 CLJ 20; [1992] 1 CLJ (Rep) 150 that announced it: "must be minutely inquired into in order to decide whether the caveat should remain on the register of document of title or be removed".

Bearing these principles in mind, I shall proceed to analyze this case.

1st Issue: Can A Registered Proprietor Caveat Its Own Land?

At the outset, on the first factor of whether there is a serious question to be tried, I find none. This is based on the legal proposition that a registered owner of the land cannot enter a caveat on its own land. Cases in support are: *Asia Commercial Finance (M) Bhd & Anor v. Development & Realtor Sdn Bhd* [1992] 2 CLJ 1175; [1992] 2 CLJ (Rep) 109, *Affin Bank Bhd v. Dato' Mohamed bin Embong* [2002] 1 CLJ 202, *Saw Cheng Boon v. Mohd. Farook b Shaik Mohaidin* [1995] 3 CLJ 759, *Sharifah Mastura bte Tuanku Ibrahim v. Wan Aziz Ibrahim* [1993] 1 CLJ 298 as well as *Re An Application by Haupiri Courts Limited (No. 2)* [1969] NZLR 353.

There is of course the obiter remark by Justice Wan Yahaya in the Supreme Court case of *J Raju v. Kwong Yik Bank Bhd & Anor* [1994] 2 MLJ 417 which says:

> Recently in *M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor*, this court upheld the declaratory decree and the consequential reliefs granted by the Johor Bahru High Court in respect of an improper auction sale by a SAR who was found to have acted *ultra vires* the NLC.
>
> In the same manner, we hold that the chargor in this case would have a caveatable interest if he could satisfy the court that his claim to the interest in the property would raise a serious question to be tried. See *Eng Mee Yong & Ors v. V Letchumanan*.

But I agree with Justice Vincent Ng's view expressed in *Saw Cheng Boon v. Mohd. Farook b Shaik Mohaidin (supra)* that:

> this case *(J Raju v. KYB Bhd)* cannot be taken as authority that a registered proprietor has *locus standi* to enter a caveat against his land under section 323(1)(a) NLC as ... this issue was not the *ratio decidendi* of that case and it was cited as oblique authority due to the absence of adverse comments by the Supreme Court against the registered proprietor therein who had caveated his own land. As, s. 323(1)(a), clearly and unambiguously provides that only a person or body claiming title to or any registrable interest in any alienated land or any right to any such title

a or interest, may caveat the land, surely, for a person who has filed a suit concerning his land to logically claim that he is in the position of one claiming title or any registrable interest in such land, would entail an unwarranted stretch of language, since he is already the legal owner of the title, and as such legal owner, the question of 'any right to any such title or interest' also could not possibly arise.

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2nd Issue: Can The Defendant Succeed In Its Claim Under 85 Suit

Though there is no necessity for me to proceed further, but for completeness and to cater for any eventuality that I erred on my finding on the 1st issue by the Court of Appeal, I shall proceed to deal with other matters raised.

c The plaintiff has asserted that the defendant's entire foundation on the existence of a serious question to be tried is dependent on the claim that the plaintiff's rights and interest in the said lands is statute barred. It comes in this manner:

d As the result of Kredin's failure to repay the loan, BBMB had issued a statutory notice of demand to the defendant on 24 December 1985. If one were to commence calculation of 12 years from this date (for the purpose of s. 21 of the Limitation Act) the last day would end on 23 December 1997. It is pivotal on this that the defendant is attempting to establish that the plaintiff is barred from asserting its rights to the said lands and thus e entitled to succeed in the 85 Suit as well as establishing in this application a serious question to be tried.

But one thing which is overlooked by the defendant is that limitation is merely a defence to an action and cannot be a cause of action. For support f of this legal proposition: *Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham* [1998] 4 CLJ 812 where Justice Sri Ram succinctly expressed:

> Further, it is well established that limitation is merely a defence to an action. It assumes the existence of a cause of action and does not create one. For, as pointed out by Sir Richard Couch, when delivering the advice g of the Board of the Privy Council in *Hari Nath Chatterjee v. Mothurmohun Goswami* [1894] ILR 21 Cal 8 at p 18: 'The intention of the law of limitation is not to give a right where there is not one, but to interpose a bar after a certain period to a suit to enforce an existing right'.

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In the 85 Suit the plaintiff was not the person who initiated the action to enable the defendant to rely on such defence of limitation. It is the other way round. Therefore the defendant's claim cannot succeed.

Refusing to concede the defendant's counsel tendered to this Court 3 English authorities to firstly nullify the above proposition and then to support the defendant's argument that a claim, based on limitation, can be instituted rather than merely to act as a remedy in a defence. I shall comment on these cases in turn with the latest decision first.

In *Horner & Cartwright*, a decision of the English Court of Appeal handed down on 11 July 1989 and reported in transcribed form bears only these backgrounds:

> The appellant, a solicitor, sued the respondent to recover a sum of Pounds Sterling 720.00 for legal fees due and owing by the respondent to him. Concerned that his claim may be statue barred, the appellant relied on the acknowledgements of such debt by the respondent in various events to support his claim. Apparently, under s. 23(a) of the English Limitation Act "the person liable or accountable therefore acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgement or the last payment."

But what is the cause of action in this case cited? If the cause of action is for a recovery of a debt and evidence to support this were the acknowledgements then this case is a poor example of the court entertaining a claim based on a statute of limitation. I presumed that the learned counsel for the defendant may be misled by page two of the judgment of this case where it states that: "The relief sought is a declaration that the rights are barred by the 1939 Act and an order setting aside any charge for any registration" to support his claim. But after careful reading of the preceding paragraphs of the transcript, I comprehend that this statement refers to a previous case where the plaintiff based his assertion of acknowledgement. This was not the relief sort in this instant case. With these reasons I find this English case not supportive of an alternative approach as canvassed by the defendant.

The second case is *Cotterell v. Price & Others* [1960] 3 All ER 315. Here the plaintiff is vested with a 2nd mortgage on a piece of property belonging to the 3rd defendant. There is a 1st mortgage vested in the 1st and 2nd defendants. 3rd defendant is wound up. Anticipating that his rights to foreclose on the said property would be time-barred the plaintiff elected another route to seek satisfaction. He gave notice to the trustee in

bankruptcy of the 3rd defendant to elect whether the trustee would exercise the option to redeem the security from the 1st and 2nd defendants otherwise he intended to proceed with redemption of the said property from the 1st mortgagor (the 1st and 2nd defendants) and thereafter secured the said property for himself after the redemption. The trustee did not exercise the option whereupon the plaintiff filed this action to enforce his rights as intended.

Again, like the case referred to earlier, the cause of action here is not one that is founded on a statute of limitation. Realizing that he may be met by a defence of statutory limitation, the plaintiff elected to proceed by the alternative route stated to lay his claim. His claim is not founded on the statute of limitation; his objective was to circumvent it. As such this case is no support for the defendant's proposition.

The 3rd case is *Lewis v. Plunket* [1937] 1 All ER Annotated 530. Here the plaintiff has charged her property to the defendant for a loan granted to her. Since the defendant did not foreclose on the property after default in repayment over a substantial period of time, the plaintiff filed this action for: (a) a declaration that the mortgage under s. 34 of the Real Property Limitation Act 1833 and, s. 1 Real Property Limitation Act 1874 has extinguished and; (b) defendant do deliver the mortgage and other documents related thereto to the plaintiff.

After reading the judgment of this case, I am of the view that the relevant sections of the Limitation Acts cited to support the plaintiff's case are specific provisions that allowed the plaintiff to bring such action. This can be perceived from the statement of Farwell J found in p. 534 where the learned judge expressed that" by virtue of the Real Property Limitation Act 1833, s. 34, and the Real Property Limitation Act 1874, s. 1, on the expiration of 12 years from 1921 the mortgagee, the defendant, ceased to have any estate or interest whatsoever in the land". But in our Malaysian scenario, s. 21(1), (2), (5) of the Limitation Act do not declare such right. Instead these sections commence with words like: "No action shall be brought" or "No foreclosure action ... shall be brought" are used. It is my view that by the nature of these phases and based on the principles founded on Common Law, our Malaysian Courts have ruled that limitation cannot found an action but can be used a defence. Thus this case cited can be distinguished and the approach therein cannot be accepted as a general proposition to lay a claim that our own Limitation Act can be used to found an action. On these, I again find this case of no support to the defendant's contention.

This being the case, there exist no serious question to be tried since the law is clear that the defendant cannot bring a claim of limitation against the plaintiff based on the circumstances of this case.

3rd Issue: The Vesting Certificate

Under s. 14(7) of the Danaharta Act, a vesting certificate executed under the seal of the plaintiff stating that an asset has been vested in the plaintiff is "conclusive evidence of such vesting as of the date of such vesting". The Vesting Certificate tendered to this court (exh. DUSB 1 in encl. 2) is sealed on 31 July 1999.

The defendant took issue on this Vesting Certificate on two counts to support its contention that there is a serious question to be tried.

The first is found in the affidavit of the defendant affirmed on 14 October 2002, where the defendant insists that the plaintiff "is entitled to nothing and the Vesting Certificate is null, void, and of no effect as there was nothing to vest at the date of the alleged vesting on 31 July 1999 as limitation has set in before the purported vesting".

As restriction and limited application of the Limitation Act has been dealt with in depth under the first substantive issue, there is no necessity for me to elaborate at length once again why this contention must fail except to say that the alleged limitation under Limitation Act cannot act as a sword but only a shield to defend an action. In the present case, no action has been filed by the plaintiff where the defendant can use this as a defence. Instead, by this assertion, the defendant has reversed the role of a defender of an action and mounted an attack on the plaintiff under the 85 Suit by claiming that the Vesting Certificate is null and void and of no effect because limitation has set in. Under the principles stated this cannot succeed.

The second approach of the defendant is found in the statement of claim of the defendant in the 85 Suit where the defendant alleged that though the Vesting Certificate is sealed and dated 31 July 1999, the plaintiff had once given notice to the defendant that its rights to the said lands and the security thereto are vested in the plaintiff on 7 May 1999. This is before the date of the Vesting Certificate. With this, the defendant avers that "the purporting certificate is null and void and of no effect".

I am much puzzled over this stand as s. 14(7) of the Danaharta Act clearly pronounced that a vesting certificate under seal shall be conclusive evidence of such vesting. So the effective date of the vesting is on 31 July 1999. This is all that matters and if there is any assertion of an earlier vesting

date then for conclusive evidence as to when vesting to the plaintiff legally took place it must be 31 July 1999. It is on this date that the plaintiff is relying on to effect its rights to remove the caveats. If there is a notice given by the plaintiff announcing an earlier vesting date then that date is not conclusive evidence of the vesting. But the plaintiff did not base its stand on that date to make this application. The plaintiff has relied on the vesting of 31 July 1999, as can be seen from its affidavit filed in support of this application where the plaintiff has categorically insists that its rights is derived from the Vesting Certificate dated 31 July 1999. This, I find is sufficient in law to justify the plaintiff's rights to the said lands and the issue raised by the defendant on the announcement of different vesting date is irrelevant.

4th Issue: Calculation Of Time

Even considering the time factor for limitation purpose, I cannot comprehend on the manner of calculation adopted by the defendant in view of the circumstances of this case. The first statutory notice dated 24 December 1985 has been declared ineffective by the Court of Appeal because it was not served at the correct address. This caused BBMB to issue a fresh Form 16D NLC notice on 13 October 1998. I would consider the date of this 2nd statutory notice to be the date of accrual for the purpose of the Limitation Act since the first statutory notice had been declared ineffective. Commencing calculation from 13 October 1998 till today the 12-year period imposed by the Limitation Act has not lapsed.

5th Issue: Balance Of Convenience

The said lands are within the golden triangle of Kuala Lumpur. Though there is a house thereon it is of no heritage or sentimental value. The real worth of the said lands is its commercial value with nothing thereon so that it could be developed. Thus, any damages resulting from the disposal of the said lands to a third party, if the caveats are lifted, could be quantified.

On the financial standing of the parties there can be no doubt that the plaintiff, with the backing of the Malaysian Government, has far greater financial ability than the defendant. The defendant, as submitted by the plaintiff's counsel, is relatively poor with no business activity and had not filed its financial returns for the past 20 years. On this factor, the balance of convenience certainly leans in favour of the plaintiff who could afford to pay any amount of damages assessed by the court for the loss of the said lands in the event of the ruling in 85 Suit is in favour of the defendant. But if it is the other way round, then there is very little likelihood that the

defendant could satisfy the plaintiff, monetary, for damages it suffered as the result of the caveats remaining. And in any event, the main element involved in this case is the fiscal aspect.

The amount alleged to be due and owing to the plaintiff by the defendant as the result of the unpaid loan is substantial. And with interest thereon running by the day any delay in the disposal of the said lands would cause greater hardship to the defendant.

Further, the sale of the said lands has been delayed on previous occasions and this has drawn strong comments from the Federal Court (as disclosed earlier) when removing the injunction imposed by the Court of Appeal in the 85 Suit. Such delay should not be occasioned once again by these caveats.

Based on this, on the balance of convenience, I find against the defendant.

Conclusion

For reasons expressed above, I hereby allow the plaintiff's application in encl. 1 with cost.